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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. —

T. L. BISHOP, ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

CARLEEN F, INCORPORATED, ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners [1] hereby pray that a writ of certiorari issue to review the judgments of the Court of Appeals

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[1] The unsuccessful appellees below in Opinion No. 71-3550 were (App. *infra*, p. 1a): T. L. Bishop; Marion Duzich; Oscar Galjour; Joe Magee; C. O. Robert; Kenneth Seals; Jack Yardley; Nathan Boudoin; Joe Buckmaster; John Lytle, t/a Lytle Shrimp Operations; Gulf Trawlers, Inc.; Sidney E. Herndon, d/b/a Herndon Marine Products Co.; and Johnson & Johnson Processors, Inc. Those in

for the Fifth Circuit both of which were entered in these proceedings on February 27, 1973.

OPINIONS BELOW

The separate opinions of the Court of Appeals, reported at 476 F.2d 977 and 476 F.2d 981, appear in the Appendix, *infra*, pp. 1a and 36a. The memorandum opinions of the District Court for the Southern District of Texas[2] were not officially reported, but are reproduced in the Appendix, *infra*, pp. 11a and 36a.

JURISDICTION

Both judgments of the Court of Appeals for the Fifth Circuit involved here were entered on February 27, 1973 (Appendix, *infra*, pp. 9a and 34a). Mr. Justice Powell extended the time for filing the petition to July 27, 1973. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. The coverage of the Federal Insurance Contributions Act (FICA) extends only to employees—a category which excludes all persons who do not have "the status of an employee . . . under the usual common law rules applicable in determining the employer-employee relationship." (Section 3121(d)(2) Internal Revenue Code). In this case the District Court found that captains and

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Opinion No. 71-3377 (Appendix, infra, p. 36a) were: Carleen F, Inc.; Madeline F, Inc.; Bryan Paul, Inc.; Donna Jean, Inc.; Hazel Foster, Inc.; Isabel G, Inc.; Leslie Lorraine, Inc.; Three G's, Inc.; Black Magic, Inc.; Miss Dene, Inc.; Sandra F. Inc.; P. C. Comeaux and W. M. Gore, t/a m/v "Eva C"; Harold N. Rotereau, t/a Trawler "St. Vincent."

[2] *T. L. Bishop* v. *United States* was tried in the Corpus Christi Division, while *Carleen F. Incorporated* v. *United States* was tried in the Galveston Division.

crewmen using petitioners' shrimp trawlers were demise charterers within the meaning of the FICA. The question presented is whether, in setting aside this determination, the court of appeals overstepped the proper bounds of judicial review and applied erroneous legal principles.

2. Whether a determination of excise tax liability under the FICA (§ 3100 *et seq.* Internal Revenue Code) by application of the principles of maritime law peculiar to the Jones Act (46 U.S.C. § 688) violates the "uniformity" provisions of Article I, Section 8 of the Constitution.

CONSTITUTION, STATUTES AND REGULATIONS INVOLVED

The pertinent portions of § 3121 of the Internal Revenue Code of 1954 and § 31.3121(d)-1 of the Treasury Regulations on employment taxes, and, the provisions of the Jones Act, 46 U.S.C. § 688, are printed in the Appendix, *infra*, pp. 64a-68a.

Article I, Section 8, cl. 1 of the Constitution provides:

> "The Congress shall have power to lay and collect taxes, duties and imposts and excises . . . but all duties, imposts and excises shall be uniform throughout the United States."

STATEMENT

The twenty-six petitioners sought to have refunded taxes paid by them pursuant to the Federal Insurance Contributions Act, 26 U.S.C. § 3100, *et seq.*

The facts as to each petitioner are for all practical purposes, the same, and show that each petitioner was the owner of a shrimp trawler and that by oral agreement each petitioner (also called "owner") in effect rented his boat to a captain, who in turn, furnished the crew, consisting of one or two fishermen in addition to the captain (Appendix, *infra*, 12a, 26a, 40a-41a, 46a, 51a).

The financial arrangements ranged from 40% to 60% of the catch to the captain and his crew and the balance to the owner. This arrangement in maritime parlance is called the "lay" plan, or fishing on shares, but no partnership was created. (Appendix, *infra*, pp. 12a, 25a, 44a-45a).

The captain of each boat was in complete control of the vessel and its operations from the time it left the dock until it returned. Each trip was considered by the parties a separate and complete transaction, to be renewed at its completion, or not, as the parties may have agreed. (Appendix, *infra*, pp. 12a, 24a-25a, 28a, 29a, 31a, 32a, 41a-42a, 47a, 48a).

The captain carried with him no list of "does and don'ts" and was not required to report to the owner until he turned the boat back to him. (Appendix, *infra*, 12a, 24a, 29a, 41a-42a, 43a, 49a-50a).

The captain purchased the food, fuel and ice which were paid for out of his and the crew's share. The owner insured and paid for repairs and damages to the boat, and in each case had some say (for reasons other than the owner's profit) where the shrimp were delivered if the boat returned to the home port; but where the shrimp were to be delivered and sold in another port was up to the captain. (Appendix, *infra*, pp. 12a-13a, 27a, 28a, 30a, 42a, 43a-44a, 45a, 47a, 48a-49a).

Each captain determined the qualifications of his crew and separately agreed with them, to the exclusion of the owner, how much each crewman was to be paid. (Appendix, *infra*, pp. 24a, 26a, 27a, 41a).

The captain, not the owner, decided when to depart on a trip, when to return, when to fish, where to fish and all other matters concerning the operation, navigation, maintenance and fishing of the boat from the commencement of the trip to its end. (Appendix, *infra*, pp. 24a-25a, 41a-42a).

It was understood that when the catch was put aboard the boat, the captain was then in possession of the catch which was owned by him (including the crew) and the owner in the agreed proportions. (Appendix, *infra*, pp. 26a, 32a, 45a).

There was no guarantee of compensation to the captain by the owner of any kind regardless of the time or effort expended in catching shrimp. All unpaid expenses of the captain's portion of the trip were considered the captain's personal obligation. (Appendix, *infra*, pp. 28a, 47a-48a).

There was no express agreement specifying the extent to which the owner had control over the captain and it was clear from the evidence that no control was exercised over the manner and methods of the undertaking used by the captain and crew, nor did the owner reserve any right of control over the vessel or the fishermen. (Appendix, *infra*, pp. 29a, 31a, 32a, 42a, 43a, 48a). Nor was there any effort by the owner to control the captain and crewmen to such an extent that their status would be one of employee rather than a demise charterer. (Appendix, *infra*, pp. 32a, 42a).

When the captain unloaded a catch at a port other than the home port it was his prerogative to sell the fish at a fishhouse of his choice where the best price could be obtained. The captain could, and did, service the boat with fuel, ice and groceries at such port and pay for them out of the proceeds from the sale of the catch. At his discretion, the captain could make the settlement between himself and the owner at that time by taking a share of the sale proceeds and sending the balance to the owner. Or, if he chose, the settlement could be deferred until the boat reached the home port. (Appendix, *infra*, pp. 13a, 30a, 48a, 49a).

There were no labor unions involved. Each owner negotiated his arrangements to let the vessel to the cap-

tain on an individual basis. (Appendix, *infra*, pp. 31a, 42a).

Neither the captain nor crewmen were required to sign ship's articles defining the owner's and fisherman's duties, nor was the captain required to keep a ship's log. (Appendix, *infra*, pp. 31a, 49a-50a).

The owner's boat did not operate under pre-arranged time schedules of departure and arrival, nor was the captain required or expected to follow a prescribed course or route common in other commercial maritime enterprises. (Appendix, *infra*, pp. 31a, 50a).

In these tax refund suits, the owner contends that the fishermen, comprising the captain and crewmen, were not his employees for purposes of the Federal Insurance Contributions Act, 26 U.S.C. § 3100, *et seq.* From this it was reasoned that the owner was not obligated to deduct, withhold and contribute as taxes, portions of the moneys the owner and fishermen received as settlements after completion of the various fishing expeditions undertaken by the fishermen in the owner's boat. (Appendix, *infra*, pp. 21a, 51a). The owner, on a trip basis, relinquished nearly complete control, command and navigation of the boat to the captain. (Appendix, *infra*, 13a, 19a, 38a-39a, 48a, 50a-51a).

A. Decisions of the District Court

The trial judges heard the evidence and examined carefully the oral arrangement between the owner and the captain for the letting of the vessel under the "lay" or share method of payment. The trial courts concluded the captain was a demise charterer and hence owner *pro haec vice*, which in turn made him the employer of the crew. In reaching that conclusion the trial courts judged the captain's status against the standards of maritime law (Appendix, *infra*, pp. 13a, 15a, 18a-19a, 32a, 37a-38a,

52a), and found convincing authority in this Court for concluding the captain was owner *pro haec vice* under the lay system. *Thorp* v. *Hammond*, 79 U.S. (12 Wall) 408, 416 (1870). Other courts were in accord. See, *The Carrier Dove*, 97 F. 111 (CA-1, 1899); *The Mettacomet*, 230 F. 308 (D. Mass., 1915) *aff'd*, 233 F. 261 (CA-1, 1916); *Cromwell* v. *Slaney*, 65 F. 940, 941 (CA-1, 1933); *Peters* v. *Rohrman*, 272 F. 338, 339 (D. N.J., 1921); *Solet* v. *M/V Capt. H. V. Dufrene*, 303 F. Supp. 980 (ED La., 1969). (Appendix, *infra*, pp. 13a-15a, 53a-56a, 57a).

The trial courts applied the common law rules to the relationship under the principles of general maritime law, giving primacy to the factors of control, concluding the captain was not an employee of the owner under the FICA, but an independent charterer. At the same time the trial courts rejected the application of those maritime rules governing Jones Act injury and wrongful death cases for determining whether the fishermen were the owner's employees. (Appendix, *infra*, pp. 13a, 15a, 19a, 21a, 51a-52a, 53a, 55a, 61a-62a). The trial courts drew a distinction between maritime rules applicable in deciding "employee" status for tax purposes and the rules applicable in injury/death cases. In tax cases the parties are of course the boatowner and the tax collector. (The seamen's rights and remedies are not in issue nor would they be bound by any decision in a proceeding where they were not parties.) In the injury/death cases, the maritime law, treating seamen as the wards of admiralty, enlarged the definition of employee giving effect to the ameliorating purposes of the Jones Act. For humanitarian reasons the Jones Act gives primacy to the recognition of the cost and debilitating effect of industrial injury, and minimizes factors of control when determining "employee" status. Obviously the standards of maritime law extend no protective wardship to tax col-

lectors in their controversies with boatowners nor are humanitarian reasons a factor in determining "employee" or "demise charter" status where tax collectors are concerned.

Based upon this reasoning, the trial courts' conception of maritime standards under the FICA enunciated by this Court in *United States* v. *Webb, Inc.*, 397 U.S. 179 (1970), compelled the conclusion that the captain was a demise charterer and owner *pro haec vice*. (Appendix, *infra*, pp. 13a, 16a, 19a, 32a, 53a, 61a-62a).

B. Court of Appeals Decisions

The reviewing court reversed the decisions of the district courts contending there was no distinction in maritime standards governing tax cases and cases in a non-tax context, and that Jones Act injury/death principles were the sole and proper source of maritime law in all determinations of "employee" status. (Appendix, *infra*, pp. 5a, 6a). The court below considered the economic disparity between an owner, with costs for operating the vessel, and the captain whose capital outlay was small in comparison, as controlling and concluded that the captain's command and control in the demise sense was not realistic (Appendix, *infra*, pp. 6a-7a). The court's thinking runs counter to this Court's holding and rationale in *United States* v. *Shea*, 152 U.S. 178, 190 (1893), upholding a demise stating:

> "We think little significance is to be attached to the provisions in reference to furnishing a crew or supplying fuel. They were matters of detail affecting the price to be paid, but throwing no particular light on the question of hiring or control."

The court of appeals ignored the realities of the captain's command, control and navigation free from the owner's realistic interference in a tax context, and chose to de-

feat the existence of a demise on economic grounds without citing authority other than Jones Act injury/death principles. (Appendix, *infra*, pp. 5a, 7a).

REASONS FOR GRANTING THE WRIT

The Court of Appeals held in this case that the captain and crewmen were the owner's employees within the scope of the FICA, reversing the conclusion of the trial court that the captain was a demise charterer and, as owner *pro haec vice*, was the employer of the crew. This case is important not only to the twenty-six owner petitioners and the captains and crews involved, but to countless owners of fishing vessels and fishermen on both Oceans, the Gulf of Mexico and on American flag vessels fishing everywhere in the world. Inherent in the Fifth Circuit's opinion is the implication that the vessel owners, rather than the captains, would be more responsible sources upon whom liability of collecting these taxes should fall. Even assuming, *arguendo*, that to be so, this Court should review the decision below so as not to deny the owners and captains the ancient precedent cited for the proposition that these "lay" agreements created demise charters.[3] To hold these seamen to be employees of

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[3] *Thorp* v. *Hammond*, 79 U.S. (12 Wall) 408 (1870). This Court held that the general owners of a vessel were not liable for damages resulting from a collision between their vessel and another where one of the co-owners become the charterer, at 79 U.S. p. 416:

> "He sailed the vessel on shares, hiring his own crew, paying and victualling them, paying half the port charges, retaining half the net freight after the port charges were taken out, and paying the general owner the other half. It is clear, therefore, that he must be considered as having been the owner *pro haec vice*."

In *The Carrier Dove*, 97 F. 111 (1 Cir., 1899), the master chartered a fishing vessel on the "quarter clear lay" of the catch. In response to a claim against the owners by the fishermen to establish a lien for wages, the First Circuit clearly indicates that

the owners *on these facts* in order to provide the tax collector supposedly a more responsible collection source will require a change in established maritime doctrine—a change the Fifth Circuit should have left to the Congress.

1. The question resolves itself into whether the evidence sustains the findings of fact by the District Court. This issue does not arise upon the trial court's disregard or misunderstanding of some definite and well-established fact. It extends to almost every detail of the decision.

The reviewing court professed acceptance of the trial judge's findings [4] yet it tried the case *de novo* on the record and substituted contrary findings of its own. For reversal, the court below seized upon the trial court's finding that either party, the owner or the captain, could terminate their relationship at the end of any trip after sale of the catch of shrimp, and therefore, as a matter of economic reality, the captain's control, free from the owner, was not realistic.[5]

The mere severing of relationships at the conclusion of a project in any undertaking does not necessarily con-

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"fishing on the lay" agreement creates a demise between the owner and the captain with the upshot that the crew are employees of and must look to the captain not the owner. See also *The Mettacomet*, 230 F. 308 (D. Mass., 1915) *aff'd*, 233 F. 261 (1 Cir., 1916). In more recent times, on facts similar to these here in all material respects, the captain of a shrimp trawler was held a charterer in a Jones Act case. *Solet* v. *m/v Capt. H.V. Dufrene*, 303 F. Supp. 980 (ED La., 1969).

[4] "Our contrary conclusion does not rest on a rejection of the trial judge's findings of fact. . ." (Appendix, *infra*, p. 3a).

[5] "Considering the relative economic disparity between the owner of an expensive ocean-going vessel with high costs for operating, bunkering, maintenance and insurance, and a prospective master whose only investment in the enterprise is his time and energy, this right to terminate is a powerful force. The notion that a master really has the full command, posssesion and control of the ship to do as he pleases in that fishing trade is simply not realistic." (Appendix, *infra*, pp. 6a-7a).

vert an independent contract relationship into that of master and servant. No good reason appears in the appellate court's opinion why relationships between boatowners and fishermen should be different. (Appendix, *infra*, p. 24a, Fdg. 6). Furthermore, that court's reasoning is contrary to this Court's admonition and rationale in *United States* v. *Webb, Inc.*, 397 U.S. 179, 185-186 (1970), that in 1948 Congress had rejected the test of "economic reality" when determining who were employees under the FICA.

The Court below simply reweighed the evidence and reviewed the trial judge's findings that were almost entirely concerned with imponderables, such as the intents of the parties respecting the degrees of control to be exercised and relinquished in the arrangement, whether the captain made business decisions in his negotiations with the owner, whether the captain's profit or loss was attributable to the way in which he combined efficiency and economy in managing the vessel and to what extent the owner could impose his will upon the captain.

The foregoing were the primary issues of fact resolved by the trial court favorable to the petitioners. The Fifth Circuit reversing, without citation of authority, stated:

> "We simply determine that the facts found by the District Court (footnote omitted) * * * are insufficient to make out the *requisite* surrender of control of the vessel by her owner to the master." (Appendix, *infra*, p. 3a) (Emphasis added)

However, the judgments of the trial courts were supported by opinions prepared with obvious care (Appendix, *infra*, pp. 12a, 36a) analyzing the evidence and showing the reasons for the findings. The memoranda and judgments represented the considered judgment of able trial judges, after patient hearing, that the government's evidence fell short of rebutting that of the peti-

tioners, a not uncommon form of litigation casualty from which the government is no more immune than others. *United States* v. *Yellow Cab Company*, 338 U.S. 338, 340 (1949).

The decision below is in conflict with the pertinent decisions of this Court. The reviewing court did not accord the district court that full measure of judicial deference to its findings of fact under Rule 52(a) F. R. Civ. P. which has been prescribed by this Court in tax cases in general, *CIR* v. *Duberstein*, 363 U.S. 278 (1960) and in particular respecting the employer-independent charterer issue in tax-oriented maritime cases, *Enochs* v. *Williams Packing Co.*, 370 U.S. 1 (1962) and *United States* v. *Webb, Inc.*, 397 U.S. 179 (1970).

The court below simply compared the cases here with others involving vastly different facts,[6] concluding there were no material differences.

Application of the statutory concept of employment under the FICA in the context of the fishing industry involves an exercise of judgment, we stress, that is peculiarly within the province of the finder-of-fact, rather than the reviewing court. The Court below manifestly disregarded the holding and rationale of this Court in a fisherman tax case, *Enochs* v. *Williams Packing Co.*, *supra*, 370 U.S. at 3:

> "'[D]egrees of control, opportunities for profit or loss, investment in the facilities, permanency of the relation and skill required * * * are important for decision [under these statutes.]'"

Again, this Court, in *United States* v. *Webb*, *supra*, 397 U.S. 179 stated there was no mechanical test of "em-

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[6] *Anderson* v. *United States*, 450 F.2d 567 (5th Cir., 1971) and the court's remand in *United States* v. *Webb, Inc.*, 424 F.2d 1070 (5th Cir., 1970) (Appendix, *infra*, pp. 3a, 5a-6a).

ployee" under the rules of maritime law and at 397 U.S., p. 194, said:

> "It is clear that this brief sketch of relevant factors cannot be intended to provide a workable test, complete in itself, displacing the common law rules Congress so carefully tried to preserve. Rather the Regulation provides a summary of the principles of the common law intended as an initial guide for the determination * * *."

The Regulation (Appendix, *infra*, p. 65a) requires that determinations of "employee" status be on a case-by-case basis. At 26 C.F.R. § 31.3121(d)-1(3):

> "Whether the relationship of employer and employee exists under the usual common law rules will in doubtful cases be determined upon an examination of the particular facts in each case."

Upon the facts in this case the captain had no responsibility to the owners apart from those common in charter arrangements in the fishing industry. The owner exercised no control over the captain and crew once the boat was let. For all practical purposes, the owner retained no control over the command, navigation or operation of the vessel until the trip was completed and the rental was paid by dividing the proceeds from the sale of the catch and a settlement of the respective shares and expenses was determined. Clearly the captain was a demise charterer on the facts here.

Clarification of the application of maritime standards to tax cases is needed (where seamen are not parties to the controversy) for determining whether "employee" status of maritime personnel is an issue of fact or one of law. The error here should be corrected in the interest of the sound administration of the Federal Insurance Contributions Act.

2. This case discloses a demonstrable need for the intervention of this Court to clarify the standards of maritime law applicable under the FICA in determining whether a captain is an employee of the owner, or is an owner himself, *pro hac vice*, and thus the employer of the crew.

The trial courts below looked to the general maritime decisional law where fishermen on the lay or share system were held demise charterers and applied the "usual common law rules applicable in determining the employer-employee relationship" contained in the FICA. Giving primacy to the control factors emphasized by this Court,[7] it was concluded by the trial courts that the captain was a demise charterer and not the owner's employee.

On review, the court of appeals reversed tracing the ten-year Odyssey through the Fifth Circuit and this Court in quest of the answer of who is the employer—captain or boatowner—of crew members of fishing vessels working on a lay for the purpose of fixing tax liabilities under the FICA.[8]

The continued uncertainty was derived from the cautious words of this Court as it (1) held that maritime standards should control but (2) did not undertake to assay either what that law was or what the lower courts should do under it.[9]

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[7] In *United States* v. *Webb, Inc.*, 397 U.S. 179 at 192 this Court stated: "Control is probably the most important factor under maritime law (footnote omitted) just as it is under the tests of land-based employment."

[8] The cases covering the ten-year period are listed in the opinion below, Appendix, *infra*, pp. 2a-3a.

[9] Reversing *United States* v. *Webb, Inc.*, 402 F.2d 956 (CA-5, 1968) this Court said, 397 U.S. 179, 194 (1970): "We conclude the Court of Appeals erred in declining to judge the status of the captains and crewmen against the standards of maritime law. Accordingly, the judgment is reversed, and the case is remanded to that court for proceedings consistent with this opinion."

The trial judges below were mindful of the Fifth Circuit's leaning toward the application of Jones Act-injury/death case principles as the maritime standard for determining "employee" status in a tax context under the FICA.[10] It is well settled that Congress intended that the Jones Act not be constricted by common law concepts of control so as to bar from its benefits, as demise charterers, those, who as a matter of economic reality, were dependent upon a business where services were renderd. *Cosmopolitan Shipping Co.* v. *McAllister*, 337 U.S. 783, 790 (1949).

Rejecting Jones Act principles as the applicable maritime standards in tax cases the trial courts said (Appendix, *infra*, pp. 15a, 55a).

> "The courts have deviated from the general maritime law in personal injury and death cases by requiring, for humanitarian reasons, that fishermen, being the wards of the sea, not be precluded *ipso facto* from recovery simply by the construction of an implied demise. The court does not believe that cases which create an enlarged standard for humanitarian purposes should be considered as changing the general maritime law or the maritime common law."

The court of appeals swept aside this reasoning, without citation of authority, stating—"there is no basis for thinking * * * that courts have 'deviated from the general maritime law in personal injury cases' in determining the existence of a demise charter." The court then focused on the precise issue and concluded in sweeping terms: "There is but a single, (Jones Act) not as urged, a double, standard." (Appendix, *infra*, p. 6a)[11]

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[10] See *Anderson* v. *United States*, 450 F.2d 570 (CA-5, 1971), and Appendix, *infra*, pp. 5a, 6a.

[11] The Fifth Circuit's rigid cataloguing of Jones Act injury/death principles as controlling a demise in tax-oriented maritime cases

The Fifth Circuit's conclusion runs contrary to the rationale of this Court in *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111 (1944) holding that the same person may be an "employee" and an "independent contractor" under separate statutes having different legislative purposes.[12]

Despite the reviewing court's scorn, the seed of uncertainty persists in that court's strong suggestion that this Court should look at the whole question again.[13]

This petition literally cries out, from both sides, for clarification by this Court for the measure of maritime standards to be applied in cases governed by the Internal Revenue Code. Tax provisions generally are not native to the niceties of maritime's ancient lore. Modern preferences dictate that a tax statute be given a con-

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runs counter to this Court's holding and rationale in *Panama R.R. Co.* v. *Johnson*, 264 U.S. 375 (1924) asserting the flexibility of maritime's principles to reflect the economy's constant changing relations, saying at 264 U.S. p. 388: "But as Congress is empowered under the Constitutional provision to alter, qualify, or supplement the maritime rules, there is no reason why it may not bring them into relative conformity to the common law rules, or some modification of the latter, if the change is country-wide and uniform in operation." See also footnote 14, *infra*, p. 17.

[12] "* * * and within a single jurisdiction a person, who, for instance, is held to be an independent contractor for the purpose of imposing vicarious liability in tort may be an 'employee' for purposes of particular legislation, such as unemployment compensation. * * * In short, the assumed simplicity and uniformity, resulting from the application of 'common law standards' does not exist." *NLRB* v. *Hearst Publication, Inc., supra*, 322 U.S. at 122.

[13] The question was raised obliquely in pursuing this Court's remand in *United States* v. *Webb, Inc.*, 397 U.S. 179 (1970) where certiorari was denied, 1970, 400 U.S. 902, "but (this) Court is free and just might re-review it in the current cases. See Hughes Tool Co. v. TWA, 1973—U.S. n.1 * * *." (Appendix, *infra*, p. 5a, ftn. 5).

temporary construction.[14] This Court should refuse to harken back to the terms and terminologies recited by the Fifth Circuit's Jones Act cases whose origins are far removed from the modern phenomena of employment taxation. To secure the uniform application of the tax laws, this Court should rectify the continued and persistent error of the Fifth Circuit in this area of taxation.

3. The respondent's enlarged standard for determining "employee" status under the Jones Act (46 U.S.C. § 688) as the basis for fixing the petitioner-owner's FICA employment tax liabilities violates the "uniformity" requirements of Article I, Sec. 8, cl. 1 of the United States Constitution. Under maritime standards the owner is liable, as an employer, for excise taxes[15] under the FICA if he retains a sufficient degree of control over the vessel's operation, command and navigation. The owner is not liable as an employer of the captain and crew "where there is nearly total relinquishment of control * * *." *United States* v. *Webb, Inc.*, 397 U.S. 179, 192. The test of "control" is the realistic application of the common law rules spelled out in the FICA and Treasury Regulation. *United States* v. *Webb, Inc., supra*, at p. 194.

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[14] The flexibility of the general maritime law (called the "law of the sea") allowed it to take on the coloration of the "usual common law rules" outlined in the FICA and Treasury Regulations when Congress amended the Social Security Act in 1939 [53 Stat. 1360, 1373-1374, c. 666, amending § 209 of the Social Security Act, 26 U.S.C. § 3121(b)], to include maritime personnel for the first time. *United States* v. *Webb, Inc.*, 397 U.S. 179, 190 (1970). "This is a recognized mode of incorporating one statute, or system of statutes, into another, and serves to bring into the latter all that is fairly covered by the reference." See, *Panama R. R. Co.* v. *Johnson*, 264 U.S. 375, 392 (1924), which brought the principles of the Federal Employer's Liability Act, April 22, 1908, c. 149, 35 Stat. 65, as amended, 45 U.S.C. § 51, *et seq.*, under admiralty jurisdiction. *Id.*, at p. 391. "[I]t brings into that law (maritime) new rules drawn from another system." *Id.*, at p. 388.

[15] The employment taxes involved here are excise taxes. *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 583 (1937) and *Helvering* v. *Davis*, 301 U.S. 619, 645 (1937).

The court of appeals persistent effort to superimpose the relaxed standards of the Jones Act (46 U.S.C. § 688) upon the provisions of the FICA, is to assess and collect excise taxes by the device of a negligence/wrongful death statute, rather than the more restrictive provisions of the Internal Revenue Code Congress provided for that purpose when it amended the Social Security Act in 1939 [16] and put the FICA to sea.

The imposition of excise tax liabilities should not be relegated to statutory schemes outside the Internal Revenue Code. The intervention of this Court is required therefore to restore the efficient and uniform administration of the Federal Insurance Contributions Act.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[16] 53 Stat. 1360, 1373-4, c.666, amending § 209 of the Social Security Act, 26 U.S.C. § 3121(b). See also footnote 14, *supra*.